NO. 80-1116

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE STANDARD REGISTER COMPANY,

Petitioner.

v.

GRAPHIC ARTS INTERNATIONAL UNION LOCAL 508, O-K-I, SUCCESSOR TO LITHOGRAPHERS AND PHOTOENGRAVERS INTERNATIONAL UNION LOCAL 275,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals correctly decided that an order removing an arbitrator and ordering a second arbitration under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, was not a final appealable order because it was a "step in the judicial enforcement of the original arbitration order" under *Goodall-Sanford, Inc.* v. *United Textile Workers,* 353 U.S. 550 (1957).

II.

PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are Graphic Arts International Union, Local 508 O-K-I, successor to Lithographers and Photoengravers International Union, Local 275; The Standard Register Company; and Freeman F. Suagee.

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COUNTER STATEMENT OF THE CASE

For the purposes of this petition, the Respondent accepts the Petitioner's Statement of the Case except in the following respects:

1. Prior to June 18, 1975, Counsel for the Respondent, Graphic Arts International Union, Local 508, O-K-I, Successor to Lithographers and Photoengravers International Union, Local 275 ("Union") requested Counsel for Petitioner, The Standard Register Company ("Company") to join in an inquiry as to the status of the arbitration case,

After that date, the Union repeatedly attempted to contact the Arbitrator by telephone and letter (App. E, p. E-11). Throughout 1975 and 1976 the Company refused to contact the Arbitrator or replace him with a new Arbitrator.

2. On November 1, 1976, in response to a Union request, United States District Judge Carl B. Rubin addressed a letter to the Arbitrator in which he established a suggested date of December 19, 1976 to issue an award or be removed as Arbitrator and stating that he would direct the parties to select a new Arbitrator (App. E., p. E-11).

3. On June 12, 1978, the Union made a final request to the Company to resolve the matter, to which the Company never replied. Only after exhausting all contractual grievance and arbitration procedures plus making every effort to find another solution, did the Union bring the instant action (App. B, p. B-5).

4. After the Court of Appeals for the Sixth Circuit dismissed the Company's appeal for lack of jurisdiction, that Court denied the Company's petition for a rehearing *en banc* on October 3, 1980 (App. C, p. C-1, C-2).

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I.

The Decision Of The Court Of Appeals Does Not Conflict With This Court's Decision In Goodall-Sanford, Inc. v. United Textile Workers, 353 U.S. 550 (1957).

A. The Order In The Instant Case Is Distinguishable From That in Goodall-Sanford.

The instant case concerned a unique situation, substantially different from that facing the District Court in any case cited by the Petitioner. The District Court in the present case removed an Arbitrator who had refused to rule on an arbitration previously ordered by that same court. It also directed a new arbitration of the dispute and took Respondent's request for damages under submission pending that arbitration (App. B, p. B-14, B-15). By contrast, Petitioner's primary authority involved a routine order to arbitrate which was brought to the District Court for the first time. *United Textile Workers* v. *Goodall-Sanford, Inc.,* 131 F.Supp. 767 (D. Maine 1955). This Court found that the order in *Goodall-Sanford* was a final order because it was not "merely a step in judicial enforcement of a claim nor auxiliary to the main proceeding but the full relief sought." *Goodall-Sanford, Inc.* v. *United Textile Workers,* 353 U.S. 550, 551 (1957). Contrary to the Petitioner's contention, this Court did not hold that arbitration was "never" a step in judicial enforcement (Petitioner's brief at 19).

B. The Court of Appeals Correctly Interpreted And Followed Goodall-Sanford.

The Court of Appeals carefully considered the instant case in the light of *Goodall-Sanford*. It noted that the arbitrability of the dispute was not at issue as it was in *Goodall-Sanford*. The Court said that the submission to a second Arbitrator was but a step in the judicial enforcement of the original order (App. A, p. A-3). Also the order did not allow for the full relief requested (App. 4, p. A-4). The Court of Appeals found that the order was not a final appealable order under the standards set down by *Goodall-Sanford*. Therefore its decision did not conflict with the Supreme Court's decision, but merely applied it to the circumstances of the present case.

II.

There Is No Conflict Between The Decision Of The Court Of Appeals And Those Of Other Courts of Appeals.

The decisions cited by the Petitioner are not in conflict with the decision in the instant case because the orders in those cases were different. In *Wells* v. *Southern Airways, Inc.*, 517 F.2d 132, 133 (5th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976), the District Court found that a Systems Board had denied the Plaintiff due process and ordered a new hearing. The District Court had not ordered the original arbitration and no Arbitrator had refused to rule. Therefore, the order was final because it was not a step in judicial enforcement.

In *Robbins* v. *George W. Prescott Publishing Co.*, 614 F.2d 3 (1st Cir. 1980), the District Court held its action in abeyance pending a *grievance* proceeding. When the Union and Company failed to arbitrate the grievance, the

Court ordered arbitration. *Id.* at *4*. Again, the Court had not originally ordered arbitration so *Robbins* is not comparable to the instant case. The order in *Electrical Workers* v. *NE Telephone Co.*, 105 LRRM 2211 (1st Cir. 1980), concerned a remand by the District Court to the original arbitration board.

In summary, *none* of the above cases cited by Petitioner involved a second court order to arbitrate due to an incomplete arbitration. Therefore, they are not in conflict with the decision of the Court of Appeals in the instant case.[1]

III.

The Decision Of The Court Of Appeals Applies Only To The Unique Factual Situation Of This Case.

The order of the Court of Appeals in the instant case may be limited to the unusual facts of this case or cases closely related to these facts. It would certainly apply in the face of an Arbitrator's refusal to issue an award when the District Court had once determined arbitrability or to cases wherein arbitration had been ordered by the court whether arbitrability was or was not the threshhold issue. It would not apply to the common situation where a Court had modified or vacated an award or had remanded it

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[1] The Second Circuit in *Clark* v. *Krafto Corp.*, 447 F.2d 933 (2nd Cir. 1971), while deciding the issue on a different basis, discussed the appealability of a 301 order. It stated that an order compelling arbitration made in the course of a continuing litigation is not a final order. *Id.* at 935. Although the facts in *Clark* differ from those in the instant case, this decision reinforces the Sixth Circuit's contention that *all* arbitration orders are not final under *Goodall-Sanford*.

to an Arbitrator. It is not certain whether the principle could be applied in a case where the Arbitrator had refused to rule but where there had been no initial judicial proceeding to compel arbitration. However that question is not before the Court. Clearly, Respondent is not questioning the finality of an order compelling arbitration as an original matter before the Court where there had been no prior submission to an Arbitrator. It is also conceivable that the very issue in a suit to compel arbitration would be a question as to whether the issue had been arbitrated in a prior arbitration. The present Circuit Court ruling would not affect the finality of an order to arbitrate in such a circumstance.

Therefore, contrary to the contention of the Petitioner, the decision of the Court of Appeals does not raise an important question of labor law or place the parties to an arbitration in an untenable position. It merely applies the principles of *Goodall-Sanford* to a unique situation.

IV.

The Issue Presented In This Case Is Not Ripe For Supreme Court Review.

The issue of the appealability of an order to remove an Arbitrator that had refused to rule in a case submitted to him has not been developed by the Court of Appeals. As was shown in Section II, the decisions cited by the Petitioner involved different types of orders than that in the instant case. There are no reported cases under 29 U.S.C. § 185 where an Arbitrator has refused to rule following an order compelling arbitration. There appears to be no Section 301 cases where an Arbitrator has failed to rule or has been removed under any circumstances. The only related non-labor authority appears to be *E. C. Ernst,*

Inc. v. *Manhattan Construction Company of Texas,* 551 F.2d 1026 (5th Cir. 1977), *cert. denied,* 434 U.S. 1067 (1978). In that case, damages were awarded to a construction subcontractor for an architect-arbitrator's delays in ruling. *Id.* at *1035.* It is not comparable to the instant case. An award for damages is clearly appealable unlike an order to remove an Arbitrator. Since there have been no similar cases decided, this Court should not grant this petition for a writ of certiorari until the lower courts have had the opportunity to more fully develop this issue

CONCLUSION

For these reasons, Respondent respectfully submits that the petition for a writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this ..... day of February, 1981, caused copies of the foregoing Brief In Opposition To Petition For Certiorari to be served upon the following persons by depositing three copies of same in the United States mail, postage pre-paid:

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